

BOARD OF APPEALS
for
MONTGOMERY COUNTY

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6600

Case No. S-2496

PETITION OF LEON TRAGER

OPINION OF THE BOARD

(Public Hearing Date: March 13, 2002)

(Effective Date of Opinion: May 9, 2002)

Case No. S-2496 is an application for a special exception pursuant to Section 59-G-2.00 (Accessory Apartment) of the Montgomery County Zoning Ordinance to permit an existing accessory apartment.

On March 13, 2002, the Board of Appeals held a hearing on the application, pursuant to Section 59-A-4.11(a) of the Zoning Ordinance. William Sher appeared on behalf of Leon Trager, in support of the application. Leon Trager also testified in support of the application. Kevin Martell, Field Supervisor, Montgomery County Department of Housing and Community Affairs, testified about his inspection of the accessory apartment. Mr. and Mrs. Karl Wollin, who live in the main dwelling unit at the subject property, also testified.

Decision of the Board: Special Exception Granted, subject
to conditions enumerated below.

EVIDENCE PRESENTED TO THE BOARD

1. Leon Trager seeks approval, under Section 59-G-2.00 of the Zoning Ordinance, of an existing accessory apartment. The subject property is Lot 4, Brickyard Meadows Subdivision, located at 7709 Brickyard Road, Potomac, Maryland, in the RE-2 Zone.
2. Mr. Trager lives in the accessory apartment and rents the main dwelling unit to Mr. and Mrs. Karl Wollin.
3. The accessory apartment is located in the basement and below the rear deck of the house. [Exhibit Nos. 3 and 4].
4. The lot comprises two acres. [Exhibit No. 3].
5. The house was built in 1984. The accessory apartment was initially created in 1984 and was enlarged in 1989. Mr. Trager purchased the house in 1986. [Exhibit No. 3].
6. The apartment has two entrances at the rear of the house. [Exhibit Nos. 8(f) and 13, p. 3].
7. There are at least 20 off-street parking spaces available. [Exhibit Nos. 3, 4, and 13].

8. Maryland National Capital Park and Planning Commission Staff recommends approval of the application. Staff finds that the use is consistent with the Potomac Master Plan, which is silent on the use, but supports the RE-2 zoning for the property, which allows accessory apartments by special exception. Staff finds that there are 23 off-street parking spaces, and that the accessory apartment is subordinate to the main dwelling. In addition the staff report notes that there are three other special exceptions in the vicinity of the subject site: a community swimming pool, a private club and service organization, and a riding stable. [Exhibit No. 13].

9. Montgomery County Housing Field Supervisor Kevin Martell inspected the subject property on March 6, 2002. A report of his inspection notes five corrections required for the subject property to comply with Housing Code and Zoning Code requirements [Exhibit No. 14]. Mr. Martell testified that based upon its square footage, the accessory apartment is suitable, under Housing Code requirements, for a family of five, or two unrelated persons.

10. Mr. and Mrs. Wollin are tenants who live in the main part of the house. They expressed concern about the metering for electricity usage in the house. In addition they stated that since Mr. Trager made changes to the house including removal of a wall and expansion of the accessory apartment, they have been disturbed by noise from the accessory apartment. The Wollins stated that the sounds are most noticeable in their kitchen, through the door which separates the two units, and in the housemaid's room.

11. Mr. Trager stated that he has installed three layers of insulation against the door which separates the accessory apartment from the rest of the house, and that he has suggested installation of additional carpeting in portions of the main part of the house, to attenuate noise.

FINDINGS OF THE BOARD

Sec. 59-G-1.2. Conditions for granting a special exception.

59-G-1.2.1. Standard for evaluation. A special exception must not be granted absent the findings required by this Article. In making these findings, the Board of Appeals, Hearing Examiner or District Council, as the case may be, must consider the inherent and non-inherent adverse effects of the use on nearby properties and the general neighborhood at the proposed location, irrespective of adverse effects the use might have if established elsewhere in the zone. Inherent adverse effects are the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site. Non-inherent adverse effects, alone or in conjunction with the inherent effects, are a sufficient basis to deny a special exception.

The Board finds that the inherent adverse effects associated with an accessory apartment include the physical activity, traffic and parking associated with the residents of the apartment, together with the presence of a separate entrance, which may require some lighting, for the apartment. Any adverse effects of this application will be minimal. The apartment's entrance is located at the rear of the house, preserving its single-family, residential appearance. The lot comprises more than two acres and the house is well set back from adjoining properties. Mature trees and vegetation provide additional buffering. [Exhibit Nos. 4 and 8]. There are at least 23 off-street parking spaces. The Board finds that there are no non-inherent adverse effects associated with the requested special exception.

59-G-1.21. General Conditions.

(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) *Is a permissible special exception in the zone.*

Pursuant to Section 59-C-1.31 of the Zoning Ordinance, accessory apartments are permitted by special exception in the RE-2 Zone.

(2) *Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

As discussed below, the use will comply with these standards and requirements.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

The Potomac Master Plan is silent about this use, but supports the existing RE-2 Zone for the subject property. Accessory apartments are allowed by special exception in the RE-2 Zone.

(4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

The Board finds that the accessory apartment will be in harmony with the general character of the neighborhood. No new structures are proposed. Activity associated with the use will have minimal impact on surrounding properties, where the zoning allows single family homes on two-acre lots. Twenty-three on site parking spaces will greatly mitigate impact on traffic and parking.

(5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that, given the minimal impact of traffic or other activity associated with the accessory apartment on surrounding properties, and given the ample buffering and that the single-family residential appearance of the home is preserved, the accessory apartment will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The proposed use will not cause any of these effects.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendation of a master or sector plan do not alter the nature of an area.*

The Board finds that the minimal visual and traffic impacts of the accessory apartment, in conjunction with the existing special exceptions for a community swimming pool, a private club and a private riding stable the proposed accessory apartment will not increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

The Board finds that, as conditioned below, the accessory apartment will have none of these adverse effects.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer public roads, storm drainage and other public facilities.*

The subject property is served by adequate public facilities.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

- (1) *Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.*

Only one accessory apartment is requested.

- (2) *The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:*

- (i) *The lot is 2 acres or more in size; and*

- (ii) *The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

The accessory apartment is located in the basement of the existing house and therefore shares more than one party wall with the main dwelling.

- (3) *An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

No addition is proposed.

- (4) *The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

The house was built in 1984.

- (5) *The accessory apartment must not be located on a lot:*

- (i) *That is occupied by a family of unrelated persons; or*
- (ii) *Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) *That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

None of these conditions exist at the subject property.

- (6) *Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

The entrance to the accessory apartment is at the rear of the house.

- (7) *All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

No external modifications to the house are proposed.

- (8) *The accessory apartment must have the same street address (house number) as the main dwelling.*

The accessory apartment has the same address as the main dwelling.

- (9) *The accessory apartment must be subordinate to the main dwelling.*

The Board adopts MNCPPC staff's finding that the accessory apartment is subordinate to the main dwelling.

(b) Ownership requirements:

- (1) *The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence*

may be increased by the Board upon a finding that a hardship would otherwise result.

Mr. Trager resides in the accessory apartment.

- (2) Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the applicant, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

Mr. Trager purchased the house in 1986.

- (3) Under no circumstances is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

The owner will not receive compensation for more than one dwelling unit.

- (4) For purposes of this section, "owner" means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the board.*

Mr. Trager owns the subject property, as evidenced by the deed submitted into the record as Exhibit No. 5.

- (5) The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Not applicable.

(c) Land use requirements:

- (1) The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot coverage, building height and the standards for an accessory building in the case of conversion of such a building.*

The subject property is 2.00265 acres and satisfies the two-acre minimum lot size for the RE-2 zone.

- (2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in an excessive concentration of similar uses in the general neighborhood of the proposed use (see also Section 59-G-1.21(a)(6) which concerns excessive concentration of special exceptions in general).*

There are no other accessory apartments in the general neighborhood. The Board finds that the minimal activity associated with the accessory apartment, in conjunction with the existing special exceptions for a community swimming pool, a private club and a private riding stable the proposed accessory apartment will not increase the number,

intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area

- (3) There shall be adequate water supply and sewage disposal systems to serve the occupants of both the accessory apartment and the main dwelling.*

The subject property is served by adequate public facilities.

- (4) Adequate parking shall be provided. There must be a minimum 2 off-street parking spaces, unless the Board makes either of the following findings:*

- (i) More spaces are required to supplement on-street parking; or*
- (ii) Adequate on-street parking permits fewer off-street spaces.*

Off-street parking spaces may be in a driveway but otherwise shall not be located in the yard between the front of the house and the street right-of-way line.

The Board finds that the 23 off-street parking spaces available are more than sufficient.

- (5) Accessory apartments shall not be detrimental to the use and peaceful enjoyment of surrounding properties or the general neighborhood, and shall cause no objectionable noise, traffic or other adverse impacts.*

The Board finds that, given the minimal impact of traffic or other activity associated with the accessory apartment on surrounding properties, and given the ample buffering and that the single-family residential appearance of the home is preserved, the accessory apartment will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood.

Based upon the foregoing, the Board finds that the special exception can be granted subject to the following conditions:

1. The Petitioner is bound by all of his testimony and exhibits of record and the testimony of his witness, to the extent that such testimony and representations are identified in the Board's Resolution granting the special exception.
2. The Petitioner must make all of the corrections noted in Housing Code Field Supervisor Kevin Martell's report, which was entered into the record as Exhibit No. 14.
3. In the room indicated with an 'X' on Exhibit No. 17, Petitioner must install an additional layer of drywall to the ceiling, mounted on resilient Z-clips.
4. At the doorway highlighted at the end of the corridor indicated on Exhibit No. 17, Petitioner must remove the door and fill in the wall with insulated drywall-on-stud construction to match the existing construction; or replace the existing hollow-core door with a solid core door and continuous soundproofing gasket and install door bottom weather-stripping.

On a motion by Allison Ishihara Fultz, seconded by Louise L. Mayer, with Donna L. Barron, Angelo M. Caputo and Donald H. Spence, Jr., Chairman in agreement, the Board adopted the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above is adopted as the Resolution required by law as its decision on the above-entitled case.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 9th day of May, 2002.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (See Section 59-A-4.63 of the County Code). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County in accordance with the Maryland Rules of Procedure.

See Section 59-A-4.53 of the Zoning Ordinance regarding the twenty-four month period within which the special exception granted by the Board must be exercised.